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August 19, 2016

By Hand and ECF
The Honorable Martin Glenn
United States Bankruptcy Court, Southern District of New York
One Bowling Green
New York, NY 10004-1408

Re: *Motors Liquidation Company Avoidance Action Trust* v. *JPMorgan Chase Bank, N.A., et al.*, Adv. Pro. No. 09-00504 (MG)

Dear Judge Glenn:

We are co-counsel with Kelley, Drye & Warren LLP to defendant JPMorgan Chase Bank, N.A. ("JPMCB"). We submit this letter, as directed by the Court, in advance of the telephonic conference the Court has scheduled for 2:00 p.m. on August 22, 2016, to consider a dispute between plaintiff and defendants as to whether plaintiff should be entitled to depose 12 of defendants' experts during fact discovery. Docket No. 707.

Background of the Dispute

On June 27, 2016, pursuant to the case scheduling order, plaintiff and Defendants Steering Committee exchanged FRCP 26(a)(2) expert disclosures in advance of the current November 7, 2016 deadline for initial expert reports. Defendants Steering Committee's expert disclosures included 12 former GM executives and engineers (the "Former GM Experts"), whom defendants stated they may call at trial to present expert testimony. Given the early stage of the case, however, defendants also reserved the right not to submit expert testimony from some or all of the Former GM Experts, and to rely on them solely as consulting experts employed for trial

preparation under FRCP 26(b)(4)(D).

After the exchange of expert disclosures, plaintiff asked whether the Former GM Experts would "be made available for depositions, during the expert discovery phase of the case, both with respect to fact testimony and expert testimony (if any)." On July 8, 2016, defendants reiterated that "defendants do not currently intend to call all 12 of the former GM employees" listed on defendants' expert disclosures, and "do not concede that all of these former GM employees possess relevant factual information that plaintiff could not more readily obtain from other sources," but nonetheless agreed that plaintiff could depose any of them about their factual knowledge (if any), in addition to their expert opinions, during the expert discovery period.

Three weeks later, on July 28, 2016, JPMCB received an email from plaintiff asking JPMCB to accept service of 12 deposition subpoenas on the Former GM Experts, which plaintiff had noticed for the *fact* deposition period, instead of the expert discovery period, and well before defendants' initial expert reports are due. JPMCB objected on the grounds that any depositions of defendants' experts should occur during the expert discovery period. The parties met and conferred, but were unable to resolve the dispute.

Defendants' Position

Defendants object to plaintiff seeking to depose the Former GM Experts during fact discovery, instead of during expert discovery. The Federal Rules are clear that, when an expert is to provide a report, any "deposition may be conducted only after the report is provided." FRCP 26(b)(4)(A). The Federal Rules also specifically require that an expert's report include all "facts or data considered by the witness in forming" the expert's opinions. FRCP 26(a)(2)(B)(ii). Thus, once plaintiff receives defendants' expert reports, plaintiff will see all of the facts or data considered by the Former GM Experts in forming their opinions. Plaintiff's experts will then be able to analyze any additional facts (in the unlikely event that, after the extensive discovery taking place here, there even are any facts that plaintiff's experts were previously unaware of) in their rebuttal reports. Plaintiff can then depose the Former GM Experts on those facts during expert discovery, as defendants have agreed. Any other timing runs afoul of the Federal Rules.

Faced with similar situations, courts have recognized that where an expert witness also has some factual knowledge, the expert still should be deposed only once — in a deposition taken during the expert discovery period and covering both expert testimony and factual knowledge. *See, e.g.*, *In re Texas Eastern Transmission Corp. Cov. Litig.*, 1990 WL 122918, at *1 (E.D. Penn. Aug. 21, 1990) (granting motion for protective order preventing potential expert from being deposed during fact discovery period despite expert's conceded factual knowledge, and instead ordering that such factual deposition occur during the expert discovery period). This is because having "one deposition of [an expert during the expert discovery period] rather than two" better serves "the interests of fairness and efficiency," notwithstanding that "the discovery deadline will have closed by the time [plaintiff] deposes [defendant's expert]." *Vision Center Northwest Inc.* v. *Vision Value LLC*, 2007 WL 2904066, at *3 (N.D. Ind. Oct. 4, 2007).

The only rationale plaintiff has given for why it should be allowed to depose the Former GM Experts now is that plaintiff should be allowed to learn any "facts" that the Former GM Experts knew prior to their retention by defendants, so that plaintiff's own experts can consider the same facts being considered by the Former GM Experts. But this rationale makes no sense. All experts have some level of relevant factual knowledge — long experience with a particular subject matter is a key component of what makes an expert an expert. And all experts

inherently draw on that factual knowledge when they form expert opinions. That does not justify permitting experts to be deposed twice in every case, both as fact witnesses and expert witnesses.

Instead, the law only permits fact depositions of retained experts where those experts have *unique* knowledge that the opposing party cannot obtain elsewhere. *See* FRCP 26(b)(4)(D) (barring depositions of trial preparation experts, including with respect to "facts known" to such experts, absent "showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means").

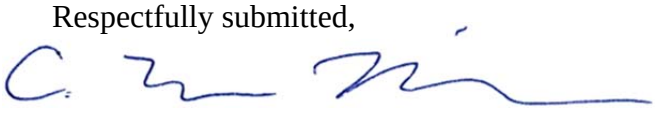
Plaintiff has not met this standard. There are undoubtedly hundreds of GM employees — current and former — who have similar levels of factual knowledge of the representative assets or similar assets and who have not been retained as experts. Indeed, plaintiff is currently working with GM to identify fact witnesses whom plaintiff will depose on the very issues it is now also seeking to depose the Former GM Experts. During the parties' meet and confer on this issue, JPMCB told plaintiff that *if* it could identify necessary factual information that one or more of the Former GM Experts uniquely holds, defendants would consider producing those experts for fact depositions. Plaintiff declined to identify any such information or individual experts, undoubtedly because plaintiff cannot.

To date, plaintiff has also provided defendants with no legal authority for the proposition that it should be able to depose individuals that defendants identified and retained as experts, who have no unique factual knowledge, during fact discovery. The one case plaintiff has identified during discussions, *Mezu v. Morgan State University*, 269 F.R.D. 565 (D. Md. 2010), involved a situation where a party identified two treating physicians as fact witnesses who might also provide expert opinion testimony and thus were "hybrid" fact/opinion witnesses — but neither party had retained the physicians as expert witnesses. *Id.* at 578; *see also Pralinksy v. Mutual of Omaha Ins. Co.*, 2009 WL 4738199 (D. Neb. Dec. 4, 2009) (holding, in a situation involving a hybrid fact/expert physician expert, that "Rule 26(b)(4) clearly proscribes deposing an expert witness prior to the expert's report being disclosed" and issuing a protective order).

Finally, if plaintiff were permitted to depose the Former GM Experts during fact discovery here, defendants would be prejudiced. Defendants have worked with the experts extensively in reviewing numerous productions from third parties, conducting plant inspections, and analyzing the hundreds of thousands of fixed assets at issue in this case. Plaintiff is now impermissibly trying to piggyback off of defendants' work to prepare its own experts. Allowing plaintiff to do so would force defendants to provide 12 experts for depositions *twice* during an already expedited discovery schedule, impinging on the time they need to complete their expert analysis. At this point, it would also be impossible to separate the Former GM Experts' pre-retention factual knowledge from work they have been doing with defendants over the past year, given how many documents have been reviewed and plant inspections conducted. Thus, plaintiff's questioning will inevitably overlap with the Former GM Experts' expert work and give plaintiff an unfair advantage in preparing its expert reports and for expert discovery.

For each of the reasons discussed above, defendants respectfully request that the Court deny plaintiff's request to depose defendants' experts during the fact discovery period.

Respectfully submitted,



C. Lee Wilson

cc: Counsel of Record (by ECF and email)